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No. 91-1232

IN THE
Supreme Court of the United States

October Term, 1991

CYNTHIA M. NORMAN,
Executrix of the Estate of
Bruce E. Norman, Deceased,

Petitioner,

v.

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a VIRGINIA POWER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS RESTATED

1. Did the Court of Appeals err in affirming the District Court's determination that Virginia Power's Plan administration committees did not abuse their discretion when they concluded that Norman was not eligible for benefits under the Plan?

2. Should this Court modify its holding in *Firestone Tire & Rubber Co. v. Bruch* and adopt a rule that where some members of a plan administration committee conduct an initial review of the evidence relevant to a benefit determination and make a recommendation to the other members, the Courts must review the benefit determination *de novo*?

STATEMENT REQUIRED BY RULE 29.1

1. Respondent Virginia Electric and Power Company's parent company is Dominion Resources, Inc.

2. Respondent Virginia Electric and Power Company has no non-wholly-owned subsidiary.

TABLE OF CONTENTS

Questions Restated i

Statement Required by Rule 29.1 ii

Table of Contents iii

Table of Authorities iv

Statement of the Case 2

I. Factual Statement 2

A. Benefit Determination 2

B. Basis for Benefit Determination 4

II. Decisions of the Lower Courts 7

Reasons for Denying the Writ 9

I. The Appeals Court Did Not Err in Holding There Was No Abuse of Discretion By the Plan Administrator 9

II. This Court Need Not and Should Not Modify Its Holding in *Firestone Tire & Rubber Co. v. Bruch* 11

Conclusion 13

TABLE OF AUTHORITIES

CASE

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) . . . . . i, 2, 7, 9, 11, 12, 13

STATUTE

Employee Retirement Income Security
Act of 1974 (ERISA) § 502(a)(1)(B),
29 U.S.C. § 1132(a)(1)(B) 4, 9, 11, 12, 13

OTHER AUTHORITIES

Supreme Court Rule 10.1 . . . . . 1, 13

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

This case does not present any issue appropriate for review by this Court. There are no "special and important reasons" for granting the writ as required by Supreme Court Rule 10.1. The lower courts' decisions do not raise any novel issues, are not in conflict with any decisions of this Court, and do not raise a conflict among the Courts of

different Circuits. The decisions are amply supported by the factual record and the applicable case law. This Court need not and should not modify its holding announced two years ago in *Firestone Tire & Rubber Co. v. Bruch*. Virginia Electric and Power Company ("Virginia Power") respectfully requests that the Petition for Certiorari filed by Cynthia M. Norman be denied.[1/]

STATEMENT OF THE CASE

I. Factual Statement

A. Benefit Determination

On December 10, 1988, Bruce Norman ("Norman"), a former employee of Virginia Power, applied for a Total and Permanent Disability Allowance under the Dominion Resources, Inc. Retirement Plan ("the Plan"). For a Virginia Power employee to qualify for such benefits, the employee must be (a) eligible by age or years of service; (b) totally disabled; (c) permanently disabled; (d) due to a bodily injury or disease; (e) while employed by Virginia Power.

The Plan provides that the determination as to whether a participant is totally and permanently disabled is to be made "on the basis of medical evidence satisfactory to a physician designated by the Administrator." Accordingly, two physicians, Dale E. Slagel, M.D., and William S. Dingledine, M.D., reviewed the two volumes of medical information relevant to Norman's claim. These volumes, containing over 600 pages, included all the documents

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[1/] Virginia Power concurs in Petitioner's description of the parties, report of the opinions and judgments below, statement of jurisdiction, and statement of the statute involved.

Norman's lawyer submitted for consideration with the claim; dozens of examination reports and test result reports from Norman's numerous examining and treating physicians; and bi-weekly reports from Norman's treating physician certifying as of every two weeks throughout the last 28 months of Norman's employment that Norman was able to return to work.

Dr. Slagel and Dr. Dingledine prepared written reports setting forth their analysis of the medical information and their recommendation that Norman's claim be denied because he had not been totally and permanently disabled due to bodily injury or disease while employed by Virginia Power. Dr. Slagel and Dr. Dingledine were members of Virginia Power's Disability Benefit Committee ("DBC"). The other four members of the DBC also reviewed the two volumes of medical information, along with the reports from Dr. Slagel and Dr. Dingledine. The DBC then met to consider Norman's claim. At this meeting, Dr. Slagel and Dr. Dingledine explained their conclusions and answered the Committee's questions. The DBC then unanimously voted that Norman was not entitled to the benefits because he had not been totally and permanently disabled due to bodily injury or disease while employed by Virginia Power.

Norman's lawyer appealed the DBC's determination to Virginia Power's Administrative Benefit Committee ("ABC") and submitted additional documents for the ABC to consider. The ABC reviewed those documents, along with the two volumes of medical information and the documents relating to the processing of Norman's claim, then met to consider the appeal. Dr. Slagel and Dr. Dingledine were not members of the ABC. They attended the ABC meeting to answer the Committee's questions, then left the meeting before the ABC voted on the appeal. The ABC concluded

that the DBC had correctly decided that Norman was not eligible for the benefits.

Norman then instituted this action under Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), alleging that he was wrongfully denied benefits under the Plan.

B. Basis for Benefit Determination

As noted above, for Norman to be eligible for the benefits he sought, the medical information had to show that he had been totally and permanently disabled due to bodily injury or disease while employed by Virginia Power. The medical information revealed the following facts.

On July 8, 1981, Norman reported that in the course of his work as a boiler operator for Virginia Power, he had been struck on the back of his neck by a rubber air hose. He was treated the following day by a doctor who diagnosed a cervical strain and authorized him to return to regular duty work on July 11, 1981.

When Norman continued to complain of headaches, nausea, and a ringing or buzzing sound, he was sent to a succession of doctors. Between July 1981 and December 1982, he was examined, tested and treated by numerous doctors in an array of specialties including neurology, otolaryngology, psychiatry, radiology, and neurosurgery. The doctors employed a wide range of diagnostic technologies, including sophisticated imaging techniques, psychological testing, and chemical testing. The results of all this testing and examination were remarkably consistent: Norman did not have any physical problems and was not totally disabled from performing job duties. To the extent

he exhibited problems, the problems were best termed a personality disorder or character disorder. Such disorders are not totally disabling and do not constitute bodily injuries or diseases. In general, a person with a character disorder is not unable, but is unwilling to satisfy expectations. Some of the doctors noted that Norman was deliberately deceptive in describing his circumstances, was highly manipulative, and appeared to be primarily motivated by a desire to obtain compensation.

In January 1983, Norman began seeing Dr. Frederick Woodson, a psychiatrist, who remained his treating physician through September 1985. During this period, Dr. Woodson saw and treated Norman every two weeks. Dr. Woodson provided certification after each appointment that Norman was able to continue working as long as he was in a low-noise environment. Dr. Woodson also concluded that Norman had a personality disorder, and he explicitly stated in his reports that Norman was not disabled from performing work, particularly clerical work. Dr. Woodson also stated after three years of treating him that Norman was not reliable in providing information and that his interest was not in a remedy, but in obtaining retirement.

Due to Norman's claimed sensitivity to noise, after July 1981 the doctors specified that Norman be assigned to work in a low-noise area. The doctors certified that with the noise limitation, Norman was able to work. Accordingly, Norman was assigned to perform clerical work in an administrative office, a low-noise area. Norman's work performance as a clerical was acceptable during the period he received his former rate of pay. On June 25, 1984, Norman's position was formally changed to clerk, with a lower pay rate than he had been receiving. Norman protested the reduction in pay and from that time through

September 1985, his work performance as a clerk was unacceptable. He was discharged on September 16, 1985, for poor performance.

Five months after his discharge, Norman went for the first time to see Dr. Daniel Kay, a psychiatrist to whom his lawyer had referred him. Dr. Kay concluded that Norman had "suffered significant deterioration" since his discharge in September 1985, yet Dr. Kay did not conclude even at that point that Norman was totally and permanently disabled. Dr. Kay acknowledged that he could not determine whether Norman had been disabled during the time of his employment with Virginia Power.

In March 1988, two and one-half years after the end of Norman's employment with Virginia Power, Dr. Kay referred Norman to Dr. John Grant, a neurosurgeon. Dr. Grant stated that it was his "impression" that Norman had experienced an injury to his brain stem. He based that conclusion solely on his observations of Norman's behavior in March 1988 and on Norman's account of his history. Norman did not provide Dr. Grant any of the volumes of medical testing and reports relating to his condition, and Dr. Grant's own tests did not reveal any physical abnormality. Like Dr. Kay, Dr. Grant acknowledged that he could not state whether Norman had been disabled during the time of his employment with Virginia Power or at any other time before 1988. Dr. Grant stated, "I have no idea what his condition was in 1985. I'd have to examine him in 1985."

The DBC and the ABC found the information from Dr. Kay and Dr. Grant of very little value in determining whether Norman had been disabled during the time of his employment with Virginia Power, the time relevant to the

benefit determination.[2] Viewing the medical information as a whole, the DBC and the ABC concluded that Norman was not totally and permanently disabled due to bodily injury or disease while employed by Virginia Power.

II. Decisions of the Lower Courts

Norman filed this action in the United States District Court for the Eastern District of Virginia, Norfolk Division. While the case was in the District Court, Bruce Norman died and Cynthia M. Norman, as Executrix of his estate, was substituted as Plaintiff. In the interest of simplicity, this Brief uses the term "Norman" to refer to either Bruce E. Norman taking actions before his death or Cynthia M. Norman acting on his behalf after his death.

The parties submitted the case to the District Court on cross-motions for summary judgment and provided the District Court the entire set of medical records which had been considered by the Plan administration committees. On December 6, 1990, the District Court issued its decision holding that Virginia Power did not abuse its discretion in determining that Norman was not eligible for total and permanent disability benefits.

Applying *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the District Court examined the Plan and determined that it conferred discretion on the Plan administration committees, such that the abuse of discretion

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[2] The Social Security benefit determination also was of limited value because it applied a different definition of "disability" from that in the Plan, among other reasons. *See* Appendix to Petitioner's Brief (cited as "App.") at 1M-34M. Petitioner's Brief is inaccurate in stating that the Social Security Judge found Norman to be "totally disabled." *See id.*

standard should apply. (App. 13C-14C). Norman has never disputed that the Plan confers such discretion.[3] Norman argued, however, that the Court should apply a different standard because Virginia Power's doctors allegedly were acting under a conflict of interest. The District Court reviewed the evidence and concluded, "the Court sees no problem as to any conflict of interest." (App. 25C). Moreover, the District Court did not agree with a Louisiana District Court decision applying a higher standard of review when the employer relied on the opinion of a doctor the employer had chosen. (App. 25C-26C). Nonetheless, the District Court gave Norman the benefit of such a "modified heightened inquiry." (*Id.*). The District Court found that the decisions of the DBC and the ABC survived even that heightened scrutiny. (App. 26C-33C).

On August 19, 1991, a unanimous panel of the Court of Appeals for the Fourth Circuit adopted the District Court's opinion and affirmed the decision that Virginia Power did not abuse its discretion when it denied Norman benefits. (App. 14B). While giving Norman the full benefit of his argument that the two Company-appointed physicians were subject to conflicts of interest, the Court of Appeals stated, "there was an overwhelming amount of medical evidence from when Norman was employed by VEPCO showing that his treating physicians then did not believe that his 1981 accident caused total and permanent disability." (*Id.*). Thus, the Court concluded that Virginia Power did not abuse its discretion in denying the benefits. (*Id.*).

Norman filed a petition for rehearing with suggestion for rehearing en banc. No member of the Court of Appeals requested a poll on the suggestion for rehearing en banc, and

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[3] *See* Court of Appeals decision at App. 13B.

the petition was denied on October 22, 1991. (App. 1A). This Petition followed.

REASONS FOR DENYING THE WRIT

I. The Appeals Court Did Not Err in Holding There Was No Abuse of Discretion By the Plan Administrator.

Norman contends that the Court of Appeals should have reversed the District Court's judgment because, he argues, the two physician members of the Disability Benefit Committee had a conflict of interest.

It must be noted at the outset that this contention does not raise an issue worthy of this Court's discretionary review on a writ of certiorari. The lower courts routinely review benefit determinations under ERISA, applying either the abuse of discretion standard or *de novo* review, as this Court specified in *Firestone Tire & Rubber Co. v. Bruch*. In this case, the District Court and the Court of Appeals merely undertook this routine review, examining the medical evidence and the Plan administration procedures in issue. Nothing in their approach or analysis conflicted with the decisions of the other Courts of Appeal or this Court. Norman has not even attempted to cite any decisions with which the Fourth Circuit's decision might conflict.

Even if the issue were worthy of this Court's review, the facts relevant to the issue would not justify granting the petition. Both of the lower courts fully considered Norman's conflict of interest contention and gave him the benefit of a heightened level of scrutiny, even though the evidence did not show a conflict of interest. They found, however, that even if they assumed a conflict of interest on the part of two

of the six members of the DBC, that did not render the decisions of the DBC and the ABC an abuse of discretion. The medical evidence overwhelmingly supported the conclusion that Norman had not been totally and permanently disabled during the time of his employment with Virginia Power.

As is explained in the next section of this Brief, Virginia Power disputes Norman's assertion that the doctors were subject to a conflict of interest. Even if Norman were correct in that assertion, however, there would still be no merit to his argument that it was illogical for the Court of Appeals to find a conflict, yet find no abuse of discretion. Norman argues that there was a conflict of interest because the other members of the DBC acted on the recommendation of the two physician members. He made this argument to the lower courts, and both the District Court and the Court of Appeals accepted the premise that they should apply a heightened inquiry to the DBC's deliberations. Those Courts concluded, however, that even if those deliberations were viewed with suspicion, the weight of the medical evidence overcame this suspicion. There is nothing logically inconsistent in the lower courts' approach or in their conclusion. Moreover, the record amply supports their conclusion.

Finally, it bears underscoring that even if the Court of Appeals had been logically inconsistent in reviewing and weighing the evidence, that would not justify an exercise of this Court's discretionary jurisdiction on certiorari. The Court of Appeals considered the significance of the doctors' membership on the DBC and gave that circumstance the weight the Court found appropriate. This Court should not devote its discretionary docket to a review of that kind of routine decision as to the weight of evidence.

II. This Court Need Not and Should Not Modify Its Holding in *Firestone Tire & Rubber Co. v. Bruch.*

Norman also contends that the Court should modify its holding in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and adopt a new rule. There is no need for such a modification. *Bruch* already adequately provides for cases such as this one. The Court need not and should not modify *Bruch* as Norman urges.

As was explained in the previous section of this Brief, Norman contends that the DBC decision was tainted by conflict of interest because the other DBC members were acting on the recommendation of the physician members. Norman urges that in such circumstances, the Courts should review the benefit determination *de novo*.

In *Firestone Tire & Rubber Co. v. Bruch*, this Court expressly rejected the argument that the proper standard of review depends on the absence or presence of a conflict of interest:

> Because we do not rest our decision on the concern for impartiality that guided the Court of Appeals, see 828 F.2d, at 143-146, we need not distinguish between types of plans or focus on the motivations of plan administrators and fiduciaries. Thus, for purposes of actions under § 1132(a)(1)(B), the *de novo* standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator is operating under a possible or actual conflict of interest. Of course, if a

> benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a "facto[r] in determining whether there is an abuse of discretion."

489 U.S. at 115 (citation omitted).

Norman has not provided any justification, either general or particular, for modifying this approach. He is merely dissatisfied with the outcome when the approach was applied to this case.

The facts of this case particularly fail to justify changing the *Bruch* approach. There is absolutely nothing improper about having certain members of a benefit administration committee conduct an initial review of the evidence relevant to a benefit determination and make a recommendation to the other members. That practice does not create a conflict of interest and does not violate ERISA.[4/] Indeed, under ERISA, there is no reason the DBC could not have been composed *solely* of the two physician members. But to the extent such a recommendation causes a reviewing court any concern about the fairness of the process, the court can and should simply take that factor into consideration, along with all the other relevant factors, in determining whether there was an abuse of discretion. That is precisely what the lower courts did in this case, and this approach gave the appropriate weight to the purported conflict of interest.

[4/] In addition, there is no conflict of interest or ERISA violation merely because the employer compensates the physicians for their work in reviewing the medical information. It is difficult to imagine how an employer could obtain such expert help without providing compensation.

The *Bruch* decision's delineation of when to apply an abuse of discretion standard and when to review *de novo* was based on a careful analysis of ERISA and the trust law underlying ERISA. Nothing in that law supports the kind of modification Norman proposes. The Court need not re-examine that law and modify its decision rendered only two years ago.

CONCLUSION

Norman's petition fails to satisfy the standard established in Supreme Court Rule 10.1 as to when this Court will exercise its discretion to grant a writ of certiorari. The decisions of the lower courts were proper and do not raise any issue which justifies this Court's review. The petition should be denied.

Respectfully submitted,

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